No. 14,811

IN THE

United States Court of Appeals

For the Ninth Circuit

JOHN DOHERTY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE.

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BRIEF FOR APPELLEE.

JURISDICTION.

Jurisdiction is conferred on this Court by Title 21 United States Code, Section 174, Title 26 United States Code, Sections 4704 and 7237, Title 18 United States Code, Section 371, and Title 28 United States Code, Section 1291.

STATEMENT OF THE CASE.

Appellant was indicted in five counts on January 26, 1955 for violations of the narcotic laws of the United States (Vol. 1, Tr. 1-6). The first count of the indictment charged both appellant and Gordon

Hollinger with concealment and facilitating the concealment of 208 grains of heroin on January 16, 1955 (Vol. 1, Tr. 2). The second count charged appellant and Hollinger with concealing and facilitating the concealment of 144 grains of heroin on January 21, 1955 (Vol. 1, Tr. 3). The fourth count charged appellant and Hollinger with selling the same 144 grains of heroin mentioned in the second count of the indictment (Vol. 1, Tr. 4). The fifth count charged conspiracy to conceal and sell heroin (Vol. 1, Tr. 4-6).

At the trial the co-defendant Gordon Hollinger was a government witness (Tr. 11). He testified that appellant, one Robert Lee Blevins and he formed a partnership for the purpose of selling narcotics sometime in December of 1954 (Tr. 106, 162). On or about January 10, 1955 the three partners discussed buying heroin from a Chinese (Tr. 26, 51). Robert Blevins called this Chinese gentleman, Bobo by name, from appellant's apartment and in appellant's presence, and arranged for a purchase of narcotics (Tr. 26, 106-111). After getting the narcotics from Bobo, appellant and the other partners added an adulterating agent to the narcotics (Tr. 31-34). Appellant tested the strength of the narcotics by using them himself (Tr. 40). Appellant and the other partners then placed the narcotics into "bindles" (Tr. 33). The narcotics were then hidden beneath the carpet on the staircase near appellant's apartment (Tr. 36). Hollinger's testimony in this respect was corroborated by the testimony of Agent Casey that narcotics were found in this place at the time of appellant's arrest (Tr. 248).

Hollinger testified that appellant, in his presence, discussed sales of narcotics and left to solicit sales of narcotics (Tr. 36, 39, 155). Appellant had received telephone calls in which narcotic sales were discussed while Hollinger was present (Tr. 189).

On January 15, 1955 appellant drove Hollinger to meet the undercover police woman to whom the January 16 (Count 1) and the January 21 (Counts 2 and 4) sales were made (Tr. 42). Appellant's assistance in the sale to the police woman in this respect was corroborated by the testimony of Agent Hipkins (Tr. 245). This act of appellant is the first overt act listed in the conspiracy count of the indictment (Count 5). Both the police woman and Hollinger testified that preliminary negotiations for a sale of narcotics were made at the Richelieu bar (Tr. 55, 197-199). They agreed to meet at the Web bar to complete arrangements for the sale (Tr. 199). The general plan of sale was sketched by appellant (Tr. 58). This plan was followed.

Hollinger was to go to the Web bar and get the money from Betty Guido, the police woman (Tr. 59). He was then to take the money across the street to the Antler Club and deposit it in the men's rest room under the wash basin (Tr. 59). Blevins was then to pick up the money (Tr. 59). Blevins was then to get narcotics and place the narcotics in the Hoe Sai Gai restaurant in the rest room (Tr. 59). Betty Guido was to pick up the narcotics there (Tr. 64). The money was taken and hidden at the Antler Club (Tr. 62), and the police woman picked up the narcotics at the res-

taurant as provided in the plan (Tr. 59). The police woman corroborated Hollinger's testimony as to this transaction (Tr. 201).

At the time of this transaction Hollinger gave to the police woman the telephone number of appellant's apartment—WAlnut 4-4104—on a piece of paper (Tr. 64). This piece of paper was U. S. Exhibit No. 5. On January 20, 1955 the police woman testified that she called that number and talked to appellant, who told her to meet defendant Hollinger at a bar to be arranged later (Tr. 203-204). Later the police woman called appellant's apartment again and talked to Hollinger, who testified appellant had told him of her prior call (Tr. 66). Appellant was present in the apartment when the police woman called (Tr. 67). Arrangements were made to meet at the Greyhound Bus Depot at 5 o'clock (Tr. 67). Hollinger testified that appellant remarked that Betty (the police woman) "was a good customer." (Tr. 67). Appellant then drove Hollinger to 7th and Mission Streets in the vicinity of the Greyhound Bus Depot to meet the police woman (Tr. 68). Hollinger's testimony in this respect was corroborated by Agent Casey who observed appellant drive Hollinger to the Post Office Building at 7th and Mission Streets at 5:30 P.M. January 20, 1955 (Tr. 240-241). The sale was arranged (Tr. 68). Hollinger then called appellant from the Greyhound Bus Depot and informed him that they had another sale (Tr. 69). Appellant informed Hollinger that the narcotics would be available around 11 o'clock (Tr. 70). Hollinger then arranged to meet

the police woman at about 11 o'clock at the Pioneer Bar (Tr. 70). Thereafter the partners discussed arrangements for the sale and delivery in appellant's apartment (Tr. 71). The narcotics were to be delivered at the Senate Club at Larkin and Turk Streets (Tr. 71). The money was to be exchanged in the Greyhound Bus Depot (Tr. 71). Hollinger then met the police woman at the Pioneer Bar, at which time she gave him $500 (Tr. 75, 77, 192, 206). At about 1 o'clock on the morning of Friday, January 21, 1955, Hollinger took Betty to Turk and Larkin Streets and left her (Tr. 78). Hollinger then went back to appellant's apartment (Tr. 79). He then received a call from Betty that the narcotics were not at the Senate Club (Tr. 79). Both Blevins and appellant were present when this phone call was made (Tr. 79). The police woman was told to look again (Tr. 80). The police woman then picked up the narcotics at the Senate Club (Tr. 208). The police woman testified that she had looked in the wrong rest room for the narcotics (Tr. 208-209).

Miss Lutz (the police woman), by prearrangement with Police Officer Getchel, called again at appellant's apartment at 6:30 (Tr. 214). Police Officer Getchel was standing at the apartment door at that time (Tr. 282). He heard this conversation: "It was that girl again. It looks like more business. Who will chauffeur this time?" (Tr. 282).

Appellant was convicted on Counts 1, 2, 4 and 5 of the indictment (Vol. 1, Tr. 9). Appeal was then timely made to this Court.

QUESTIONS PRESENTED.

Appellant does not list in his opening brief any legal questions arising from this appeal. In our opinion, this neglect is caused by the fact that there are no substantial questions raised on this appeal.

ARGUMENT.

I. IN FEDERAL COURT CONVICTION MAY REST ON THE UNCORROBORATED TESTIMONY OF AN ACCOMPLICE.

Appellant has confused the rule in Federal Court with the rule that obtains in the State of California. He has cited sections of the California Penal Code and cases decided by the California State Supreme Court as requiring corroboration. However, he has failed to cite one Federal case which holds that such corroboration is required in a Federal criminal case.

It is well settled by innumerable cases in this Circuit that a conviction *can* rest on the uncorroborated testimony of an accomplice.

Lung v. United States (9th Cir., 1915), 218 F. 817;

Diggs v. United States (9th Cir., 1915), 220 F. 545, affirmed 242 U.S. 470;

Hass v. United States (9th Cir., 1929), 31 F. 2d 13, cert. denied;

Ahearn v. United States (9th Cir., 1925), 3 F. 2d 808, cert. denied;

Todorow v. United States (9th Cir., 1949), 173 F.2d 439;

Westenrider v. United States (9th Cir., 1943), 134 F.2d 772;

Stillman v. United States (9th Cir., 1949), 177 F.2d 607;

Rapp v. United States (9th Cir., 1944), 146 F. 2d 548;

Catrino v. United States (9th Cir., 1949), 176 F.2d 884;

Cossack v. United States (9th Cir., 1936), 82 F.2d 214, cert. denied.

II. THE ACCOMPLICE'S TESTIMONY WAS CORROBORATED.

A reading of the facts of this case will demonstrate that the evidence against appellant was overwhelming. The co-defendant Hollinger's testimony was corroborated at every stage of the proceeding. Narcotics were found under the carpet on the stairs near appellant's apartment by the arresting officers (Tr. 248). The police woman, Miss Lutz, or Betty Guido as she was known by appellant, corroborated Hollinger's testimony at every stage. Just before appellant's arrest Police Officer Getchel overheard a conversation concerning the police woman: "It was that girl again. It looks like more business. Who will chauffeur this time?" (Tr. 282). This conversation presupposed a knowledge of the "business transactions" involving heroin with which appellant is charged in the indictment. The police woman actually talked to appellant on the telephone, and this conversation presupposed knowledge on appellant's part of the heroin transactions with which he is charged (Tr. 203). Appellant

also was observed driving the defendant Hollinger to meetings for the sale of narcotics (Tr. 240-241, 245).

There was sufficient evidence in the record to convict appellant if Hollinger had not testified for the government at all.

III. THE COURT DID INSTRUCT ON THE EFFECT OF THE TESTIMONY OF AN ACCOMPLICE.

Appellant did not comply with Rule 30 of the Federal Rules of Criminal Procedure by objecting to instructions. This rule provides in part as follows:

> ". . . No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. . . ."

Mr. Bramy, appellant's counsel, when asked whether he had any exceptions, declared that he had "none" except that he joined in counsel for Blevins' exception with reference to a defense instruction on the subject of overt acts (Tr. 426).

By failure to make any objection, appellant may not raise any objections on appeal. However, appellant's contention suffers even a graver defect. The instruction he claims the Court erroneously failed to give was in fact given. At page 418 in the transcript the Court gave the following instruction:

> "An accomplice is defined to be one concerned with another or others in the commission of a crime. It is a settled rule in this country that

> even accomplices are competent witnesses, and that the Government has a right to use them as such. It is the duty of the court to admit their testimony and the jury must consider it.
>
> "The testimony of accomplices, however, is always to be received with caution and weighed and scrutinized with great care and the jury should not rely on it unsupported unless it produces in their minds a positive conviction of its truth. If it does, the jury should act upon it."

This instruction seems to go even farther than two instructions expressly approved by this Court.

Stillman v. United States (9th Cir., 1949), 177 F.2d 607, 616;

Cossack v. United States (9th Cir., 1936), 82 F.2d 214, 217.

IV. THE COURT WAS NOT REQUIRED TO TRY APPELLANT'S CASE FOR HIM.

Appellant makes some contention that counsel at the trial did not properly represent him. No attack is made upon the competence of counsel, but appellant's counsel feels that the case should have been tried in a different manner. He seems to imply that the trial judge should have entered into the proceedings in some way to the advantage of appellant. What actually appellant desired the trial judge to do does not appear in appellant's brief. He makes some vague mention of leading and suggestive questions but does not bother to inform this Court or appellee what

questions are objectionable. Appellant's contentions in this respect are flimsy, unsubstantiated and approaching the frivolous if, indeed, they have not reached it.

CONCLUSION.

The evidence in this case was overwhelming. Appellant was properly convicted. His appeal is without merit. The judgment should be affirmed.

Dated, San Francisco, California,
December 16, 1955.

Respectfully submitted,

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